

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JOSEPH H. DEBELLA**

Claimant

VS.

**MID-WEST CONVEYOR COMPANY**

Respondent

AND

**INSURANCE COMPANY**

**STATE OF PENNSYLVANIA**

Insurance Carrier

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Docket No. 213,383

**ORDER**

Respondent and its insurance carrier appealed the August 4, 2005, Post-Award Medical Award entered by Administrative Law Judge Kenneth J. Hursh. The Board placed this appeal on its summary docket for disposition without oral argument. Jeff K. Cooper of Topeka, Kansas, was appointed Board Member Pro Tem to serve in place of Board Member Julie A. N. Sample, who initially presided over this claim as the administrative law judge.

**APPEARANCES**

James E. Martin of Overland Park, Kansas, appeared for claimant. Gary R. Terrill of Overland Park, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Board is listed in the Post-Award Medical Award.

**ISSUES**

This is a post-award request for additional medical treatment.

On April 22, 1996, claimant injured his left knee while working for respondent. On August 10, 1998, Judge Sample entered the award in this claim. Judge Sample held that claimant sustained personal injury by accident that arose out of and in the course of his employment with respondent. Additionally, Judge Sample determined claimant sustained

a 16.5 percent permanent partial impairment to the left lower extremity due to his work-related accident.

This is the second request for additional medical treatment as claimant earlier sought and was granted conservative medical treatment for his left knee from Dr. Gerald F. Dugan. As Dr. Dugan now recommends a total left knee replacement, claimant initiated the present request for post-award medical benefits. In the August 4, 2005, Post-Award Medical Award, Judge Hursh granted claimant's request for the knee replacement surgery after finding the surgery would address the effects of the work-related injury. The Judge reasoned, in part:

The question for the court is whether the recommended surgery is reasonable and necessary treatment to cure and relieve the worker from the effects of the injury. If it is, then the employer is liable for it, according to K.S.A. 44-510h. The proposed surgery will replace knee cartilage that degenerated over sixty-plus years of the claimant's life, and not, in any significant way, because of the 1996 work accident. The proposed surgery will also, hopefully, relieve pain in the left knee that did not exist in any significant way until the 1996 work accident.

The "effects of the injury" as that term is used in K.S.A. 44-510h are not merely the quantifiable changes in the claimant's bodily tissues, but also how the claimant feels. In this case, the claimant's almost-sixty-year-old knee cartilage was not damaged in any quantifiable way by the 1996 accident, but his pain level in the left knee did change significantly. That was an effect of the injury. The claimant has tolerated the increased pain for a number of years, and reached a point where he thinks it is in his best interests to have it addressed surgically. The surgery will address the relatively recent condition of significant pain that began with the work injury, as well as the longstanding condition of loss of joint cartilage that happened independent of the work injury. Still, the surgical procedure will address the effects of the work injury, and it shall be provided by the respondent.<sup>1</sup>

In addition, Judge Hursh awarded claimant expenses and attorney fees under K.S.A. 2004 Supp. 44-510k in the sum of \$5,786.88.

Respondent and its insurance carrier contend Judge Hursh erred. They first argue claimant's left knee has not changed since the August 1998 Award and, therefore, the requested medical treatment is not necessary at this time. Second, respondent and its insurance carrier argue claimant failed to prove the requested medical treatment is related to his April 22, 1996, accident and resulting injury. Instead, they argue that any medical treatment that claimant may presently require is the result of the natural progression of the degenerative disease in his left knee joint that preexisted his work-related accident. And, finally, respondent and its insurance carrier argue they should not be required to pay any

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<sup>1</sup> ALJ Award (Aug. 4, 2005) at 2.

monies for claimant's attorney fees or expenses. In summary, respondent and its insurance carrier request the Board to reverse the August 4, 2005, Post-Award Medical Award.

Conversely, claimant contends the Board should affirm the order requiring respondent and its insurance carrier to provide claimant with additional medical treatment. But claimant also requests the Board to increase the award of attorney fees by increasing the hourly rate from \$125 to \$175 per hour, award attorney fees for an additional 12.3 hours of work expended on this appeal, and allow a reasonable amount for paralegal services.

The issues before the Board on this appeal are:

1. Is left knee replacement surgery now appropriate? And, if so, is the surgery a consequence of, or directly related to, claimant's April 22, 1996, accident at work?
2. What award, if any, should be entered for the time claimant's attorney and his paralegal expended in this post-award application?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the parties' arguments, the Board finds and concludes:

In the August 10, 1998, Award entered by Judge Sample, the Judge determined claimant injured his left knee in an April 22, 1996, accident that arose out of and in the course of his employment with respondent. Accordingly, the Judge awarded claimant permanent disability benefits under the schedule of K.S.A. 1996 Supp. 44-510d for a 16.5 percent functional impairment to his left leg. Judge Sample found, in pertinent part:

After a review of the record as a whole, the Court has no difficulty concluding Claimant sustained personal injury by accident on April 22, 1996 and that said injury arose out of and in the course of his employment with Respondent. While the evidence suggests that Claimant had sustained other prior injuries, the uncontroverted evidence indicates that Claimant suffered immediate pain and swelling following the accident of April 22, 1996. In fact, the doctors even seem to agree that the April 22, 1996 accident caused the tear in his left knee.

Both physicians [Dr. Gerald F. Dugan and Dr. P. Brent Koprivica] are in agreement as to the Claimant's diagnosis and need for future treatment. They also agree Claimant's knee showed signs of degenerative changes and that these changes predated the April 22, 1996 accident. Yet, there is no evidence that this disease was significantly affecting his job or his lifestyle such that it required medical treatment. He was continuing to work and after he had minor accidents, including a minor sprain and even then he was able to work his way through it with minimal

treatment. The April 22, 1996 accident simply caused an injury that was more significant than those he'd previously experienced. However, it seems equally clear that the level of degeneration observed by Dr. Dugan was such that Claimant had to be experiencing some discomfort, albeit minor and insignificant enough so as not to impede his ability to carry on his normal activities.

The existence, nature and extent of the disability of an injured workman is a question of fact. [Citations omitted.] The factfinder *[sic]* is free to consider all the evidence and decide for itself the percent of disability the claimant suffers. [Citation omitted.] After a complete review of the record, particularly the testimony of the physicians, the Court is of the opinion that the Claimant's true impairment lies somewhere in between the figures assigned by each of the doctors. Accordingly, the Court then finds that the Claimant is entitled to a 16-1/2% permanent partial impairment to the lower extremity. This takes into account the opinions held by both doctors as well as the shortfalls associated with each.<sup>2</sup>

In reaching the above conclusion, in the August 10, 1998, Award Judge Sample found that Dr. Gerald F. Dugan, who was one of claimant's initial treating physicians and who operated on claimant's left knee in June 1996, believed claimant would need additional medical treatment such as anti-inflammatories and possibly knee replacement surgery. In addition, Judge Sample found Dr. P. Brent Koprivica, who examined claimant at claimant's attorney's request, also believed claimant would likely require a total knee replacement at some point.

In light of the above, claimant now requests additional medical benefits, including authorization to undergo a total left knee replacement.

**1. Is left knee replacement surgery now appropriate? And, if so, is the surgery a consequence of, or directly related to, claimant's April 22, 1996, accident at work?**

This is claimant's second request for post-award medical benefits. In July 2003, Judge Sample granted claimant's request to obtain conservative medical treatment from Dr. Dugan. Consequently, claimant returned to Dr. Dugan for steroid injections in his left knee, which the doctor provided in July and September 2003. And in May 2004, Dr. Dugan again

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<sup>2</sup> ALJ Award (Aug. 10, 1998) at 5. Judge Sample found that Dr. Dugan rated claimant as having a 30 percent functional impairment to his left leg under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3d ed. rev.), with only eight percent attributable to the April 22, 1996, accident. Conversely, the Judge found Dr. Koprivica rated claimant as having a 25 percent functional impairment to his left leg, with the doctor attributing all 25 percent to the April 1996 accident as the preexisting degenerative changes in claimant's knee were not symptomatic and did not limit claimant before claimant's accident at work.

injected claimant's left knee. At that visit, claimant and the doctor again discussed a left knee joint replacement but that claimant should delay the surgery as long as he could tolerate the pain and swelling in his knee.

Claimant was initially hesitant to undergo knee replacement surgery. But since his April 1996 accident his symptoms have progressively worsened and, consequently, claimant now desires the procedure.

In this application for additional medical treatment, claimant presented Dr. Dugan's testimony. According to Dr. Dugan, who has practiced orthopedic surgery for approximately 18 years, a total knee replacement is appropriate when the patient decides he or she has tried all other options, the patient is willing to assume the risks of major surgery, and the patient is willing to do the post-surgery therapy, which often lasts six to 12 months, that will make the surgery successful. And according to Dr. Dugan, claimant is a candidate for a knee replacement and the doctor is waiting for when claimant decides he needs it done. Moreover, Dr. Dugan believes claimant's original injury and the resulting June 1996 surgery have contributed to claimant's need for the knee replacement.<sup>3</sup> Dr. Dugan cited claimant's obesity and the alignment of his knee as other factors that have contributed to claimant's degenerative joint disease and his need for a knee replacement.

In his July 15, 2003, office notes, Dr. Dugan wrote, in part:

We discussed the findings, the options, the timing; all associated with Mr. Debella's current condition. I think many fractures *[sic]* have contributed to the development of the degenerative change. This includes his age, activity level, his size, as well as the specific injury that he had related to his job duties. You can't say that anyone *[sic]* of these alone resulted in the degenerative change, which has developed in his knee, however, a combination of all of these have certainly contributed. I don't think that his meniscal injury is the only reason; however, it is a significant contributing factor to the development of his arthritis. He reports no significant problems with the knee prior to the onset of his injury seven years ago and has had no subsequent injury to that knee since that time; therefore, I would have to make the assumption that this **injury is a major contributing factor to the onset of his arthritic condition** of the knee for possible further medical management.<sup>4</sup> (Emphasis added.)

On the other hand, respondent and its insurance carrier presented the testimony of orthopedic surgeon Dr. Jeffrey T. MacMillan. The doctor examined claimant in mid-March 2005 at the request of respondent and its insurance carrier. According to Dr. MacMillan,

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<sup>3</sup> Dugan Depo. at 12.

<sup>4</sup> *Id.*, Ex. 2.

claimant's left knee was worn out before the April 1996 accident as little normal joint surface remained and the "knee . . . was ready for a retread regardless of anything else that might come along."<sup>5</sup> In summary, the doctor attributes any need for medical treatment to claimant's left knee to claimant's age. Dr. MacMillan, however, did acknowledge that claimant's April 22, 1996, accident could have provoked or aggravated the degenerative disease in claimant's left knee and made it symptomatic.

The Board finds the greater weight of the evidence establishes that claimant's request for a left knee replacement is reasonable and that the total knee replacement is directly related to claimant's April 22, 1996, accident at work. The Board affirms Judge Hursh's finding that the knee replacement surgery is reasonable and necessary medical treatment in addressing and relieving the effects of the injuries that claimant sustained in his April 1996 work-related accident. Accordingly, the Board affirms the award of additional medical benefits for claimant's left knee, including joint replacement.

**2. What award, if any, should be entered for the time claimant's attorney and his paralegal expended in this post-award application?**

Judge Hursh awarded claimant the sum of \$5,786.88 in attorney fees and expenses for the services that claimant's attorney rendered in this post-award proceeding. That sum included \$4,937.50 in attorney fees, which the Judge computed by multiplying 39.5 hours by \$125 per hour.

But respondent and its insurance carrier contend "the administrative law judge committed error in awarding attorneys fees to counsel for the claimant."<sup>6</sup>

Conversely, claimant's attorney argues that the hourly rate for the attorney fees should be increased from \$125 to \$175 per hour and that he should also receive fees for 6.7 hours of his paralegal's time at \$75 per hour. In addition, claimant's attorney requests fees for an additional 12.3 hours for the time expended on this appeal.

The Board affirms Judge Hursh's finding that claimant should receive an award for attorney fees under K.S.A. 2004 Supp. 44-510k for the services his attorney performed in this post-award application for additional medical benefits. Likewise, the Board adopts the \$125 hourly rate the Judge utilized to compute those fees.

The Board, however, finds claimant's attorney should also receive the sum of \$335, which represents 6.7 hours at \$50 per hour, for the time his paralegal expended in this post-

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<sup>5</sup> MacMillan Depo. at 12.

<sup>6</sup> Application for Board Review at 2 (filed Aug. 17, 2005).

award proceeding. The services provided by the paralegal, which appear reasonable and appropriate, were more than merely clerical or ministerial and, therefore, should be considered as part and parcel of the services rendered by claimant's attorney. Moreover, as shown in this instance, utilizing a paralegal may result in monetary savings.

Claimant's attorney's request for additional fees for the legal services rendered in this appeal should be presented to the Judge after proper notice to afford respondent and its insurance carrier an opportunity to address that request.

Based upon the above, the Board increases the award of attorney fees by \$335. Accordingly, respondent and its insurance carrier should pay claimant's attorney the sum of \$6,121.88 in fees and expenses.

**AWARD**

**WHEREFORE**, the Board modifies the August 4, 2005, Post-Award Medical Award by increasing the award for claimant's attorney fees and expenses to \$6,121.88. In all other respects the Board affirms the Post-Award Medical Award.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant  
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director